UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

BABCOCK & WILCOX CONSTRUCTION CO., INC.,

and Case: 28-CA-22625

COLETTA KIM BENELI, An Individual

William Mabry III, Phoenix, Arizona,
for the General Counsel.
Dean E. Westman, (Kastner, Westman
& Wilkins), Akron, Ohio, for the Respondent.

DECISION

Statement of the Case

Jay R. Pollack, Administrative Law Judge: I heard this case in trial at Show Low, Arizona, on January 17-18, 2012. On July 30, 2009, Coletta Kim Beneli (Beneli) filed a charge alleging that Babcock & Wilcox Construction Co., Inc. (Respondent or the Employer) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).On September 29, 2009, Beneli filed an amended charge against Respondent. On August 29, 2011, the Regional Director for Region 28, issued a complaint and notice of hearing alleging that Respondent violated Section 8(a) (3) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the post-hearing briefs of the parties, I make the following.

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Findings of Fact

I. Jurisdiction

Respondent, a Delaware corporation, at times material herein, was engaged as a construction contractor providing field construction and maintenance service for Arizona Public Service at Joseph City, Arizona. During the twelve months prior to the filing of the charge, Respondent received gross revenues in excess of $50,000 from services provided outside Arizona. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find, the International Union of Operating Engineers Local 428 has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Factual Summary

Since 1996, Respondent and the International Union of Operating Engineers (the International) and its Local 428 (the Union) have been parties to the National Maintenance Agreement, which is currently in effect. Respondent has also been signatory to a multi-employer association agreement between the Union and the Arizona Chapter of the Associated General Contractors of America, Inc. At all times material herein, Respondent was performing construction and maintenance work for Arizona Public Service (APS) at a coal plant in Joseph City, Arizona.

On January 12, 2009, Beneli began working for Respondent at the Joseph City jobsite as a utility operator, operating a forklift and a crane. Shortly after beginning work for Respondent, Beneli became the Union job steward for the worksite. On February 2, Respondent brought in a new operator, Ian Christianson, to work at the jobsite. Beneli called the Union and found out that Christianson had not been dispatched through the Union's hiring hall. Beneli spoke to Christianson and told the employee that he needed a dispatch from the Union's hiring hall. Christianson told Beneli that he would speak with management and take care of it. Later that day Christianson told Beneli that he had spoken to Respondent's timekeeper.

On February 16, Robert Alsop, a foreman and union member, told Beneli that he had not been paid properly for a full 40-hour week. Beneli spoke with Christopher Goff, Respondent's project superintendent. Beneli told Goff that Alsop was short ten hours on his paycheck. Goff asked why and Beneli responded that the collective-bargaining agreement guaranteed foremen 40 hours a week. Goff then asked Beneli to tell the timekeeper, Rhonda Roberson, to cut Alsop a check for the full forty hours.

On March 10, Beneli saw another new operator on the job. Beneli asked the new operator, Heath Riley, whether he was referred from the Union's hiring hall. Riley answered that he had been called directly by Goff. Beneli called the Union and then had Riley speak with the Union dispatcher. Beneli told Riley that the Union and Respondent would work it out.

On March 11, Alsop told Beneli that Bill Roberson, APS representative, wanted to speak with her. After a short discussion, Beneli stated that she had spoken to the Union about Alsop's guaranteed pay. Beneli told Roberson that it would be a lot better if Goff did not bring operators

from outside the State without using the Union's hiring hall. Goff walked in at the end of the conversation.

On March 11, after meeting with Roberson, Beneli was late for the morning's job safety analysis (jsa) meeting. Goff told Beneli that he wanted to speak with her. When Beneli asked if he wanted to speak at that moment, Goff angrily responded, "I will take care of you later missy." After the meeting, Goff asked Beneli what she had discussed with Roberson. Beneli said she had told Roberson that Riley had not been dispatched from the Union's hiring hall and about Alsop's pay issue. Goff asked why Beneli had not discussed the matter with him. Beneli explained that Roberson had asked her to talk with him. Goff said that the contract was with Respondent and not with APS. Beneli said that she had made a mistake and that it would not happen again. Goff said that he did not say Alsop should be paid for forty hours. Beneli disagreed telling Goff where and when he had told her to tell Rhonda Roberson to pay Alsop the full amount. Goff said that it was none of Beneli's business. Goff told Beneli that she had no business talking to APS. Beneli stated that she had made a mistake but that Bill Roberson had asked to talk to her. Goff told Beneli that she was sticking her nose where it does not belong and asking questions that were none of her business. Goff told Beneli that she was not supposed to take care of Union business on company time. After this meeting, Beneli called Shawn Williams, Union assistant business manager.

Williams testified that at about 8 a.m. on March 11, he received a call from Goff. Ralph McDesmond, safety representative was also on the call. Goff told Williams that he wanted to terminate Beneli because she had overstepped her boundaries as the Union's steward and was crossing the line into management. Williams testified that Goff said Beneli was raising contractual issues and trying to tell Respondent what they are supposed to pay employees. Williams stated that in his view Beneli was acting as a steward should. Goff stated that Beneli should not be getting APS, Respondent's customer, involved by raising contractual issues with APS. Williams said that in the future Beneli would raise contractual issues solely with Respondent. Williams stated that if Goff discharged Beneli, the Union would fight the discharge and file a grievance.

On March 11, sometime after 2:00 pm, Alsop told Beneli that Goff had called him and wanted them both to go to Respondent's office. Beneli and Alsop went to Goff's office, where they found McDesmond and Matt Winklestine, safety representative, waiting. Winklestine told Beneli that she was being suspended for violating two safety policies earlier that day. Specifically Winkelstine said Beneli had been observed eating a pastry during the jsa meeting, and that she had failed to fill out a separate jsa form. Beneli laughed and asked Winklestine where it stated she could not eat a pastry during the jsa meeting. Winklestine said he would look for it. Beneli again asked to see it in writing. Winklestine said he did not have to show Beneli anything. Winklestine then stated that Beneli was being suspended for three days without pay for the two safety violations.

Beneli turned to McDesmond and said, "So this is the f_____ game you guys are going to play?" Almost immediately Winklestine and McDesmond pointed their fingers at Beneli and stated that she was terminated. McDesmond said that Beneli had threatened them. Beneli said that she did not threaten anyone but said, "is this the f_____ game you are going to play?" McDesmond stated there you go again and once more accused Beneli of threatening them. McDesmond then told Rhonda Roberson to prepare termination papers and to cut Beneli's final check. Beneli refused to sign the termination papers which stated that she was being terminated for "inappropriate conduct."

Respondent's Defense

Respondent presented evidence that Beneli was not a safety conscious employee. She used her cell phone while operating equipment, moved a crane without a spotter and drove a forklift through a prohibited area. She was given a written warning on February 2 for driving through the prohibited area.

Beneli was also late for several joint safety analysis meetings. On March 11, Beneli was late for the jsa meeting. She also admits to eating a pastry at the meeting. In addition she failed to fill out a second jsa form that day. Both Goff and McDesmond deny having a conversation with Williams on March 11.

On that day, Goff and McDesmond consulted over the telephone with Dave Crichton, Respondent's corporate manager of labor relations. They agreed to give Beneli a three-day suspension for safety violations. Winklestine filled out the disciplinary suspension form. When Winklestine began to explain the suspension, Beneli became angry. She said in an angry tone, "if you guys want to play this f_____ game, we'll see."," Mc Desmond asked what she had said and Beneli repeated it. McDesmond immediately responded that Beneli was discharged. Respondent contends that Beneli was discharged for her angry outburst and use of profanity at this disciplinary interview. Respondent denied that Beneli was discharged because of her activities as Union steward.

The Grievance

On March 19, the Union filed a grievance over Beneli's suspension and discharge. The grievance moved through the contractual grievance procedure to Step 4, which calls for a hearing before the grievance review subcommittee (subcommittee). A quorum of five representatives consisting of at least two management representatives, two labor representatives, and one NAMPC staff representative considers and decides a grievance at Step 4. All subcommittee determinations are based upon the facts presented, both written and oral, and any decision rendered is final, binding and not subject to any appeal.

On their Step 4 grievance fact form, the Union asserted that Beneli's termination was in violation of the National Maintenance Agreement, NLRA Section 7 . . . and decisions made by the NLRB." Additionally, the Union contended that "While engaged in a representational capacity as a Union steward [Grievant] made the following statement '. . . so this is the f_____ game you guys are going to play.' She was immediately terminated without further discussion in the process."

On October 8, the Step 4 hearing was conducted before the subcommittee panel. Both the Respondent and the International Union provided the subcommittee with position statements and documentary evidence. The International Union submitted a statement position and provided various documents in support of the grievance, including a three-page report setting out a detailed timeline of Beneli's extensive union and concerted activities in the month and a half before her suspension and discharge. Respondent's position statement stated in part, that Beneli "was terminated due to the inappropriate conduct which she engaged in when the Company Supervisor informed her of their intent to administer a . . . three day disciplinary suspension for safety violations." Respondent also asserted that a supervisor had complained that "the Steward was disruptive in terms of the amount of time being spent on Union duties, and had frequently evidenced a poor attitude toward safety on the job." Additionally, attached to Respondent's position statement were statements prepared by Respondent's witnesses who were present at the March 11 meeting.

By letter dated October 8, the subcommittee denied the grievance and upheld Beneli's discharge. The subcommittee noted the "issue was the Union's contention the [Respondent] violated Article XXIII Management Clause of the National Maintenance Agreement by terminating the grievant, without just cause, for the grievant's use of profanity" and that the subcommittee "reviewed all the information submitted both written and oral" and determined that "no violation of the National Maintenance Agreement occurred and therefore, the grievance was denied."

On September 30, 2009, Region 28 issued a letter which deferred the charge to the parties grievance/arbitration procedure pursuant to *Dubo Manufacturing Corporation,*142 NLRB 431 (11963). A portion of the charge was resolved by a non-Board settlement whereby Respondent agreed to post a notice for 60 days. The parties provided the Region with a letter which stated:

> At issue was the Union's contention that Respondent violated Article XXIII Management Clause of the National Maintenance Agreement by terminating the grievant, without just cause for the grievant's use of profanity.
>
> Respondent contends that grievant was terminated for just cause due to the grievant's use of profanity and insubordinate conduct upon receipt of disciplinary action.
>
> After reviewing all the information submitted, both written and oral, the subcommittee determined that no violation of the National Maintenance Agreement occurred and therefore, the grievance was denied. This determination is based on the facts presented and reviewed in the instant case and only applies to this specific grievance.

Thereafter Beneli informed the Region that she was not satisfied with the grievance decision and asked that the Region not defer to it. The Region considered Respondent's position but determined that the grievance decision was repugnant to the Act and reversed the deferral. On August 29, 2011, the Region issued the complaint in this matter.

Should the Board Defer to the Subcommittee's Decision?

Under the current *Spielberg/Olin* standards, the Board defers to arbitral awards and final disposition of joint employer-union committees when: (1) all parties agreed to be bound by the decision of the arbitrator: (2) the proceedings appear to be fair and regular; (3) the arbitrator adequately considered the unfair labor practice issue; and (4) the award is clearly not repugnant to the policies of the Act. *Spielberg Mfg. Co.,* 112 NLRB 1080 at 1082 (1955); *Olin Corp*., 268 NLRB 573 at 574 (1984). See also, *K-Mechanical Services, Inc.,* 299 NLRB 114,117 (1990) (applying *Spielberg/ Olin* deferral standards to determinations by joint employer-union committees that are final dispositions of a grievance).

Here General Counsel concedes that the proceedings were fair and regular and that all parties had agreed to be bound by the decision. In addition, the contractual issue presented was factually parallel to the unfair labor practice issue and the subcommittee was generally presented with the facts relevant to resolving the unfair labor practice. General Counsel contends that the subcommittee's decision was repugnant to the Act. Here, the subcommittee found that Beleni was discharged for the use of profanity and insubordination upon receipt of her discipline. Although not stated in its decision, the subcommittee rejected the assertion that Beneli was discharged because of her duties as steward. While I credited Beneli and Williams, the subcommittee could have credited Respondent's witnesses. While I would reach a different

conclusion, I do not find this factual decision by the subcommittee to be repugnant to the Act. Accordingly, I recommend that the Board defer to the arbitration and grievance procedure.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Board should defer to the decision of the NAMPC subcommittee.

3. Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[2]

ORDER

The complaint should be dismissed.

Dated, Washington, D.C. April 9, 2012

Jay R. Pollack
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.